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Ms. Sherry Green
Office of Site Remediation Enforcement
U.S. EPA
1200 Pennsylvania Avenue, NW
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RE: Response to EPA Questions Regarding Standard Practices in the Recycling Industry

Dear Ms. Green:

On behalf of my client, Waste Management, I would like to express our appreciation for the opportunity to comment on the issue of whether guidance is needed regarding the Superfund Recycling Equity Act (SREA) and the form such guidance might take. Particularly in this case, where legislation providing benefits to a particular industry segment may inure to the detriment of others in industry, government and the general public, it is crucial to solicit the broadest possible input.

Before responding to EPA's specific questions regarding current practices in the recycling industry, we want to make the observation that SREA has actual impact on three, and possibly four, of the categories of scrap identified. In our experience, scrap paper, scrap plastic, scrap glass, and scrap textiles almost never serve as a basis for an assertion of Superfund liability. Scrap rubber (not including whole tires) is also rarely, if ever, used as the basis to assert Superfund liability. Whole tires themselves don't create Superfund liability until they catch on fire. Hence, we don't believe the Agency's investigation of practices in industries involving the above-referenced scrap materials is a useful exercise.

With respect to lead acid batteries, we question whether value is added by the exercise of due diligence (reasonable care). It is our experience that lead acid battery smelters are all eventually going to become NPL sites. We would be hard pressed to take the position that

materials sent to a smelter could reasonably be expected to be recycled without adverse environmental impact.

With regard to scrap metal – and even the recycling industry across the board --we don't believe there are standard practices for determining the integrity of the "consuming facility." In the absence of a federal regulatory baseline, state and local requirements vary widely. In these circumstances, there can be no generic checklist of required environmental protections. There has been, however, substantial experience in conducting environmental due diligence on RCRA-regulated land disposal facilities, hazardous waste treatment and storage facilities, and spent lead acid battery processors. The experience of auditing RCRA-regulated facilities provides some guidance until such time as EPA provides federal standards for recycling facilities.

Finally, but preliminarily, the Agency needs to decide whether different persons (as identified by numbers in the next sentences) in the recycling chain should be charged with differing levels of reasonable care. The (1) homeowner who places mixed recyclables at the curb should have different burdens than the (2) hauling company who delivers them pursuant to its contract with a (3) municipality at the advice of a (4) broker to a (5) sorting facility which ships aluminum bales to a (6) secondary smelter. In addition, the Agency needs rules for a business which is (7) large, (8) medium, or (9) small in size which provides recyclables to a (10) hauler arranged by a (11) broker who ships to a (12) consuming facility which transships to (13) another. Note that all have at least some burden. Experience at the Landsdown Superfund site teaches us that even the watchmaker next door can wreak environmental havoc. Those who seek exemption from Superfund's strict liability should have the burden of proving they satisfied all required conditions for exemption. The burden on generators of recyclables which commonly have been found at Superfund sites, and the burden on recyclers themselves who transship to Superfund sites, should be particularly heavy.

Answer to Questions

1. There are two principal avenues for conducting diligence regarding compliance by "consuming facilities." The first involves a phone call to the local authorities (city or county health department and fire department) which is the agency most likely to receive complaints from facility neighbors and passersby. Local health departments have their own enforcement mechanisms (citations, notices of violation, warning letters) and retain a file containing these documents. Frequently, the local health department inspector familiar with the facility will volunteer opinions regarding the

operating procedures and conditions at the subject facility. Local fire departments will have records of spills, explosions, or fires.

The second source of useful information about the compliance status of operating facilities is the state file. Facilities of the type at issue here require storm water pollution prevention permits, Clean Air Act permits, or facility-specific state permits. These files will contain permit applications, permits, and copies of any communications between the permitted facility and the Agency, as well as indicia of any enforcement activity.

As a cautionary note, reliance on state files is not always reliable as many state agencies have less than vigilant enforcement programs.

2. Scrap material generators should evaluate compliance status, housekeeping practices, and facility conditions in evaluating consuming facilities. The generator should not only evaluate current compliance conditions, but historic operating practices, as a previous owner/operator may well have created an environmental condition on the premises wholly unrelated to the current compliant operations. Housekeeping practices are important because they reflect on the attitude of management. Rarely in our experience does a facility that appears to be well-maintained display significant compliance problems.

   Also important is the solvency and future viability of the owner/operator of the facility. Solvent owner/operators are the least likely persons to pursue their customers if an environmental condition requires attention. From the view of the citizenry, solvency is even more crucial. If the exemptions of SREA apply, only the owner/operator remains accountable for the cost of cleanup.

3. See answer to No. 1.

4. See answers to Nos. 1 and 7.

5. Compliant operators don't change their spots. Hence, if a management team has a history of compliant activity, reliance on that performance is appropriate. Changes in personnel on the management team, most importantly the on-site operations manager, should reduce the weight of reliance on historic practices.

6. The criteria in Section 127(c)(6) regarding "reasonable care" have varying degrees of importance in evaluating the integrity of the consuming facility. For example, the

price paid in the transaction is only meaningful in the context of the overall marketplace. The marketplace for recyclable goods is highly volatile; meaning that from day-to-day, price fluctuations can be extreme. It may be quite difficult to utilize price to measure compliance. The ability of a person to detect the nature of the consuming facility's operations, on the other hand, is always highly relevant. No generator of recyclable goods should do business with a consuming facility that will not allow itself to be audited. Inquiries to state agencies can also be useful as described in the answer to No. 1 above.

7. The absence of a site visit as part of "reasonable care" should disqualify the generator of recyclable goods from the exemption. Though such visits should not be required of homeowners, the visit would be an educational family experience.

8. See No. 1 above.

9. Review and approval of consuming facilities should be an annual event.

10. We don't believe that it is ever appropriate to rely solely on the consuming facility's checklist or self-certification. Nonetheless, a company with a deserved reputation for responsible compliant practices should be afforded some deference in the conduct of diligence.

The irony of these questions is that the focus on compliance is partially misplaced. Many facilities which manage scrap materials are located in historic industrial areas frequently characterized by soil and groundwater contamination. Current compliant practices mean only that historic site conditions will not be exacerbated. EPA is confronted with an important policy question in determining whether it will expand the terms of SREA to allow recyclables generators to evade the responsibility the Agency otherwise imposes on all Superfund parties to pay jointly and severally for the cost of commingled historic pollution. The position is takes here will have precedential value in other Superfund contexts.

Also ironic is that the federal government, responsible for enforcing our environmental laws, might be viewed here as delegating that responsibility to consumers of recycling services. Notwithstanding the fact that responsible generators of recyclable goods should have been exercising reasonable care all along, EPA should have been doing the same as well. To confirm that this is so, one need only look at the vast majority of NPL sites, the conditions of which are largely attributable to ineffectual state and federal enforcement activities. To the

extent that EPA acquiesces to exemptions from Superfund for select parties, it assumes a heavier burden to assure that the facilities at which the exemptions apply will not harm human health or the environment.

Waste Management greatly appreciates the opportunity to share its view regarding the measure by which generators of recyclable goods can become eligible for the recyclers' exemption. However, given the very narrow exemption and the few sites at which it will apply, we urge EPA to focus its resources on other areas in which the Agency can more significantly improve the environment.

Very truly yours,

SEYFARTH SHAW

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